# STATE OF MICHIGAN

# COURT OF APPEALS

PRESQUE ISLE ELECTRIC & GAS CO-OP,

Plaintiff-Appellee,

v

VILLAGE OF HILLMAN and HILLMAN VILLAGE COUNCIL,

Defendants-Appellants.

UNPUBLISHED
July 22, 2008

No. 278986
Montmorency Circuit Court
LC No. 07-001644-CB

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

In this contract dispute, defendants appeal as of right from the trial court order granting summary disposition in favor of plaintiff. For the reasons set forth in this opinion, we reverse and remand for entry of summary disposition in favor of defendants. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff is a non-profit, member-owned utility that provides both electricity and natural gas to customers in northeastern Michigan. On August 2, 1994, the Village granted plaintiff a non-exclusive franchise to provide natural gas to its residents and businesses. The Village adopted the parties' franchise agreement as an ordinance. Plaintiff and defendants agree that the franchise agreement constitutes a written contract.

In 2006, when the parties were unable to resolve a disagreement regarding a proposed rate increase, plaintiff sought to compel the Village to join in an application to submit the dispute to the Michigan Public Service Commission (MPSC) for resolution.[1] Plaintiff relied on the following language in § 2 of the franchise agreement:

[1] In 2003, during a prior dispute concerning a proposed rate increase, plaintiff sought to submit the issue to the MPSC for resolution. However, the MPSC dismissed Plaintiff's application for lack of jurisdiction, noting that MCL 460.54 confers jurisdiction for it to issue a rate order only when a public utility and a municipality jointly submit the rate issue to it. Because the parties subsequently agreed to revised rates, Plaintiff did not appeal the MPSC's order of dismissal.

> In the event either Presque Isle or the Village of Hillman are [sic] dissatisfied with the existing rates and the parties are not able to arrive at a mutual agreement, either Presque Isle or the Village of Hillman may seek a determination from the Michigan Public Service Commission as to the appropriate rate — and such determination, when it becomes final and nonappealable, shall be binding on both Presque Isle and the Village of Hillman.

When defendants refused to join plaintiff in seeking the assistance of the MPSC, plaintiff initiated the instant action, asserting that § 2 of the franchise agreement imposes on one party the contractual duty to do what is necessary to effectuate the other party's submission of a dispute to the MPSC. The trial court adopted plaintiff's interpretation of the provision and entered an order granting summary disposition in favor of plaintiff and directing defendants to participate in a joint application to the MPSC for resolution of the rate dispute.

Defendants argue that the trial court erred in finding that the franchise agreement obligates defendants to join in plaintiff's application to the MPSC to resolve their rate dispute and in granting plaintiff's motion for summary disposition based on this erroneous contractual interpretation.

This Court reviews de novo a trial court's decision on a motion for summary disposition. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Robinson v Ford Motor Co*, 277 Mich App 146, 150-151; 744 NW2d 363 (2007). The proper interpretation of a contract is a question of law, which this Court likewise reviews de novo. *Coates v Bastian Brothers, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

In interpreting a contract, a court must determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, the court must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law. *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

The franchise agreement provides that, in the event of a rate dispute, "either" plaintiff or the Village may seek a determination from the MPSC. According to *The New Oxford American Dictionary*, p. 546, "either" is "used before the first of two (or occasionally more) alternatives that are being specified (the other being introduced by 'or')." Accordingly, the plain and unambiguous language of the franchise agreement provides that plaintiff could apply to the MPSC to settle a rate dispute, or the Village could. We find nothing in the language of the franchise agreement that can be construed as requiring one party to join in an application to the MPSC by the other party. This conclusion is further supported by the use of the word "may," which indicates that that the language is permissive rather than mandatory. See *Mill Creek Coalition v South Branch of Mill Creek Intercounty Drain Dist*, 210 Mich App 559, 565; 534 NW2d 168 (1995).

Plaintiff contends the contract must be read to provide a fair and reliable means of resolving rate disputes. However, the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). Our Supreme Court has specifically rejected this

approach to contract interpretation in which "judges divide the parties' reasonable expectations and then rewrite the contract accordingly." See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). Here, the plain language of the franchise agreement does not require the Village to join in an application to the MPSC to settle a rate dispute. This Court cannot remedy any defects or omissions in the parties' contractual dispute resolution procedure by rewriting the franchise agreement to include such an obligation. Further, a party cannot be bound to an obligation that is not actually covered by the terms of the agreement. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 397; 729 NW2d 277 (2006).

Plaintiff maintains that § 2 of the franchise agreement constitutes an enforceable arbitration agreement. However, to the extent that § 2 constitutes an arbitration agreement, the parties must be deemed to have agreed to common-law arbitration because the agreement does not provide that a judgment of any circuit court may be rendered upon the award. See MCL 600.5001; *Wold Architects & Engineers v Strat*, 474 Mich 223, 231; 713 NW2d 750 (2006). In common-law arbitration, one party may unilaterally revoke the agreement and terminate arbitration at any time before the arbitrator renders an award. *Id*. Accordingly, even if the parties agreed to arbitrate their rate disputes, the Village retained the right to revoke the agreement.

Plaintiff warns of the consequences to both itself and the residents of the Village if the parties' inability to resolve the rate dispute leads to revocation of the franchise agreement pursuant to § 12. While the cancellation of the franchise granted to plaintiff by the Village will undoubtedly have repercussions for both parties, that is not an issue for this or any other Court. Rather, the responsibility of a court is to enforce a valid contract as written. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 202; 747 NW2d 811 (2008). It is not the task of the courts to rescue parties from the consequences of entering into ill-advised or incomplete contracts. See *Lee v Stratford Arms Hotel Co*, 236 Mich 520, 530; 211 NW 103 (1926) ("If plaintiff was unwise in making the contracts he must let the expense thereof stand as tuition in the school of experience").

Accordingly, the trial court erred in granting plaintiff's motion for summary disposition and ordering defendants to join with plaintiff in an application to the MPSC. The trial court further erred in denying defendants' counter-motion for summary disposition. We therefore reverse the grant of summary disposition in favor of plaintiff and remand to the trial court for entry of summary disposition in favor of defendants.

Finally, defendants argue that the trial court erred by providing in its order that if defendants refused to sign a joint application, then the order itself would stand as the consent of the Village. However, defendants state in their brief that the Village complied with the trial court order and executed an application to the MPSC. Because defendants executed the application themselves, and the portion of the trial court's order providing that it would constitute the consent of the Village therefore never became operative, this issue is moot. See *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003). Because this issue is unlikely to recur, yet evade judicial review, we decline to address it. See *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello